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No. 08-067

IN THE

Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AND REX SHELBY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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AMICUS BRIEF IN SUPPORT OF PETITIONER IN *YEAGER V. UNITED STATES OF AMERICA*

INTERESTS OF THE AMICI

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas, non-profit corporation with a membership of more than 2900 attorneys practicing in the State of Texas. TCDLA was organized more than 37 years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation among lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

Rex Shelby was Petitioner F. Scott Yeager's co-defendant at trial. This Court denied his petition for writ of certiorari in a companion case. While he is not a party to this proceeding he has a keen interest in its outcome as any modification of the law of collateral estoppel will be applicable to his case going forward under the Fifth Circuit's law of the case doctrine. Shelby was previously set for re-trial on February 2, 2009, but the district court has since abated the proceeding pending the outcome of this appeal.

Amici TCDLA and Shelby believe that the question presented as granted naturally encompasses the legal issues argued herein, namely the exact bounds of the collateral estoppel test articulated by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970).

Both Petitioner F. Scott Yeager and the government have given written consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court recognized collateral estoppel in federal criminal trials as part of the protection against multiple prosecutions nearly a century ago in *United States v. Oppenheimer,* 242 U.S. 85 (1916). While *Oppenheimer* confirmed that an issue of ultimate fact, once decided, cannot be relitigated at the defendant's peril, it made no effort to articulate a collateral estoppel standard. The Court's subsequent application of collateral estoppel in a criminal case, *Ashe v. Swenson*, while setting forth broad standards, did little to elucidate the application of those standards to determining the effect of prior verdicts, beyond eschewing an overly technical view of the record that could effectively deprive an acquittal of its constitutional effect. The growing uncertainty about the application of the *Ashe* test is reflected in the conflict among the lower courts and the Fifth Circuit's candidly open struggle with the standard during argument in this case.

This case thus presents the Court with a critical opportunity to articulate a standard by which prior judgments of acquittal are evaluated and to secure substance to the guarantee against Double Jeopardy. The Amici agree with Petitioner Yeager that unanswered counts should not be included in the collateral estoppel analysis. They also agree that a straightforward application of *Ashe* would require reversal as to Yeager. Beyond this, the Amici respectfully suggest that the Court should consider

the extent and distribution of the burden, bearing in mind that some level of uncertainty is unavoidable in examining a general verdict.

The formulation adopted in the Fifth Circuit in this case assigns too heavy a burden to the defendant. In particular, the Fifth Circuit wrongly required the Defendants to account for the jury's failure to arrive at verdicts on the counts sought to be barred and to do so in the face of a peculiar presumption of jury rationality that would have required the jury to acquit on all counts in the first place. An equally troublesome part of the Fifth Circuit's decision below is the consideration of inferences the jury is not asked to make at a particular trial or which may become increasingly unlikely or even absurd when viewed against the record as a whole. In so doing, the court left an uninterrupted series of acquittals as to three Defendants with no preclusive effect whatsoever. If jury indecision or freelancing is properly part of the collateral estoppel inquiry, the acquitted defendant should not have the burden of proving a negative by explaining indecision or overcoming presumptions as part of the analysis of what a jury necessarily decided. That result, driven by the Fifth Circuit's crabbed collateral estoppel standard, offends traditional notions of fair play and substantial justice. Indeed, the Fifth Circuit's standard creates an incentive, particularly strong in high-profile cases such as this, to over indict, leaving the risk of any uncertainty from an incomplete outcome or a worn-down or confused jury entirely to the defendant.

ARGUMENT

In the past several decades, Congress has vastly expanded the reach of the federal criminal code to address a broad variety of corporate and financial activities. More often than not, a single human undertaking alleged to constitute a crime will implicate several distinct prohibitions in Title 18. Prosecutors have essentially unlimited discretion in adding multiple overlapping counts, and the motivation for doing so is particularly acute in major white-collar prosecutions such as this one.

Recognizing the proliferation of offenses for "substantially identical offense conduct," the United States Sentencing Guidelines, for example, treat multiple statutory offenses like the single factual offense they really are by calling for concurrent punishment in order to "limit the significance of charging decisions." U.S.S.G. § 3D1.1. In addition, the Sentencing Guidelines determine offense levels based on what is found to be the total offense conduct by means of considering all relevant conduct and by aggregating all loss resulting from the total offense conduct. U.S.S.G. §§ 1B1.3, 2B1.1.

This Court's decisions in *Oppenheimer* and *Ashe* make clear that the government may not structure seriatim litigation in order to test critically disputed fact issues in one proceeding by simply withholding indictments or counts on one or more other overlapping theories of criminal culpability and reserving the remainder for a second trial. The immediate problem is whether the prosecution may accomplish the same purpose by presenting voluminous overlapping or potentially overlapping

counts in the same case, reserving the right to proceed anew where, by virtue of exhaustion, confusion or some other indiscernible reason, a jury acquits only in part. Under the Fifth Circuit's decisions the government can effectively over-charge a defendant out of his Fifth Amendment collateral estoppel protection.

I. THE FIFTH CIRCUIT'S COLLATERAL ESTOPPEL TEST IS ILLOGICAL, IMPRACTICAL, AND INADEQUATE TO PROTECT THE LIBERTY INTERESTS OF THE ACCUSED.

In assigning the risks of uncertainty between the state and the defendant, the Fifth Circuit erred in two ways. First, it erred in including in the defendant's burden of establishing what the jury necessarily decided an obligation to explain the jury's failure to give answers. Second, by forcing an impractical, unrealistic presumption of rationality on the jury's verdict — including the failure to arrive at a complete verdict and consideration of issues not contested at trial — the Fifth Circuit precluded any possibility of repose and robbed the acquittals of any constitutional significance.

As suggested by *Ashe,* the Fifth Circuit put the burden on the Defendants in this case to show what the jury necessarily decided when it acquitted them on a host of charges. Pet. App. 28a, *United States v. Yeager*, 521 F.3d 367, 371 (5th Cir. 2008). *Ashe* called broadly for a review of the entire case with an eye toward both "realism and rationality" and cautioned that any overly restrictive formulation would risk denying practical effect to the Double

Jeopardy Clause. *Ashe v. Swenson,* 397 U.S. 436, 444 (1970). The Fifth Circuit has structured a test certain to deny any preclusive effect to those acquittals, despite *Ashe's* warning that any "technically restrictive test" would simply result "in a rejection of collateral estoppel in criminal proceedings." *Id.* at 444.

While *Ashe* called for courts confronting a past acquittal to take a practical view of the issues it resolved, it offered no detailed guidance with respect to how a court should go about the often difficult task of assessing what the jury decided. This Court has acknowledged that the lower courts have placed the burden on the Defendant to demonstrate what issue was actually decided. *Dowling v. United States*, 493 U.S. 342, 350-51 (1990). But it has never examined the wisdom of the lower courts' practice or the extent of that burden, namely whether it should be as absolute as practiced by the Fifth Circuit.

Rather than simply putting the Defendants to the burden of showing which of the elements in the acquitted charges were uncontested for practical purposes and focusing on the actively contested facts and inferences as they were presented to the jury, the Fifth Circuit's formulation went too far. It required the Defendants to explain why the jury had not arrived at a decision on the remaining counts and, in doing so, to overcome a presumption of rationality applicable both to the actual findings and the failure to arrive at verdicts. The impossible combination operated like a thumb on the scales, rejecting as irrational any factual determination that would be in common among the decided and undecided counts. Thus, as predicted by *Ashe,* the Fifth Circuit

effectively foreclosed the prospect of preclusion regardless of the actual probability that the jury decided a particular issue of fact. In essence, the Fifth Circuit's drive for its version of rationality blinded it to *Ashe's* overarching call for realism and practicality.

A. Compelling the acquitted defendant to justify the rationality of a jury's failure to arrive at a verdict as a condition of pre–clusion on those same counts is illogical.

As Petitioner Yeager details, the founders were well aware of the considerable mental, emotional, and financial ordeal suffered by the accused defending his liberty though trial. Thus, a verdict of acquittal has substantial, fundamental constitutional significance under the Double Jeopardy Clause. And yet, by imposing a logically impenetrable fortress around the very counts at issue, the Fifth Circuit has deprived acquittals in a partial verdict case of any conceivable preclusive effect.

Where, as here, the jury has been discharged after giving only a partial verdict, the question of what facts it decided is dispositive of the broader — and constitutionally critical question — of whether the defendant can be forced to run the gauntlet a second time. By looking to the unanswered counts and presuming that the jury would have acquitted had it decided any fact in common with the actual verdict, the defendant's effort to establish any preclusive effect becomes impossible. Regardless of how narrow the *genuine* fact dispute at trial, any conclusion that the jury decided something in common between the acquitted and hung counts conflicts with the court's

formulation of a "presumption of rationality" and must be presumptively dismissed on that basis. Moreover, by placing the burden of disproving increasingly ungrounded speculation on the defendant, the test becomes practically impossible, as he or she is forced to disprove a series of increasingly improbable negatives, i.e., to prove that the jury did not decide on some basis that is not apparent from the record. While, on the facts of the record below, the jury's verdict was quite consistent, albeit incomplete, that consistency among answered counts supports a finding of rationality when discerned pursuant to the full framework of *Ashe*.

B. Forcing the acquitted defendant to overcome a myopic presumption of rationality as part of the burden of establishing what a jury necessarily decided is also contrary to practice and experience.

While it may be that a perfectly rational jury that decided a common factual issue in a defendant's favor would acquit on all counts every time, the *Ashe* test is more thoughtful. It adds realism and practicality to the rationality presumed on the part of a jury. The Fifth Circuit presumed, as the First and D.C. Circuits have, that if the jury would have found a common issue in the Defendants' favor, it would have acquitted on all counts. A blindly rational analysis might come to that conclusion, but in addition to rationality, *Ashe* requires realism, practicality, and an analysis firmly grounded in the record of a particular trial.

The analysis in the Fifth Circuit and in other cases in the lower courts is reminiscent of Alice's argument with the Red Queen: no matter what Alice's answer, the Red Queen simply changes the question or redefines the pertinent terms until Alice is left with "a riddle with no answer."[1] The sparse words of guidance in *Ashe* — realism, rationality, practicality — are made to mean too many different things leading to sporadic and absurd results.

In civil cases, this Court has long recognized that juries do not always act in predictable ways. While the Court adheres to the presumption that a jury has followed instructions when confronting efforts to set aside their verdict, it has taken a more realistic approach where multiple trials before different juries are concerned, acknowledging that juries do not always act in purely rational ways. Where a jury has decided a case in full, the Court has been careful to prevent a second trial on only part of the issues unless they are clearly distinct and separable. *Gasoline Prods. v. Champlin Refining,* 283 U.S. 494 (1931). For example, a jury's decisions on liability and damages are distinctly guided by instructions; but no one would deny that jurors do, as a practical matter, nonetheless carry and express a relevant sense of outrage at the Defendant or, conversely, a sense of compassion in having decided a close case on the merits to their damage calculations. *E.g., Great*

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[1] *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS, ch. 9, The Millennium Fulcrum Edition 1.7, *available at*, http://www.gutenberg.org/files/12/12-h/12-h.htm.

Coastal Exp. v. Int'l B'hood of Teamsters, 511 F.2d 839 (4th Cir. 1975) (recognizing prospect of jury compromise); *Simo v. Mitsubishi Motors,* 245 Fed. App'x 245 (4th Cir. 2007) (refusing to permit retrial on punitive damages alone).

Likewise, the Court has acknowledged the practical reality that juries in criminal trials will give voice to "residual doubt" of guilt in their sentencing decisions, though the defendant is obviously not entitled to an instruction to encourage this. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). If jury behavior always confined itself predictably to instructions, courts would not have found the need to establish a rule forbidding admission of proof of the actual deliberation process, even where it would prove misconduct, confusion or compromise. FED. R. EVID. 606(b), Adv. Comm. note; *but see Maddox v. United States,* 146 U.S. 140 (1892) (noted in advisory committee notes as exception to the general rule of inadmissibility).

As noted by Petitioner Yeager, here the most probable reason for a partial verdict, given the long trial, lengthy deliberations, and time-limited *Allen* charge, is that the jury simply got tired and rendered a "five o'clock verdict" so they could go home. Viewed with practicality and realism that is the most rational explanation for the seemingly random incomplete verdict. And yet, the Fifth Circuit's test dismisses this key record fact out of hand and denies relief on the presumption that some other reason explains the result.

Where a jury's verdict results in uncertainty in a criminal proceeding with its attendant heightened

safeguards aimed at preserving the defendant's liberty interests, leaving the defendant's Double Jeopardy rights at the mercy of a fiction and assigning all of the risks of that uncertainty to the accused is profoundly unfair, contrary to the clear directives in *Ashe* that courts should avoid any overly "technical" view, and contrary to the fundamental purpose of the Double Jeopardy Clause — to protect the accused from suffering the risks and tribulations of a subsequent prosecution.

II. THE BURDEN ON THE DEFENDANT SHOULD BE PRACTICALLY FOCUSED ON THE ISSUES ACTUALLY CONTESTED BEFORE THE JURY.

A. Ashe's call for a realistic approach was well founded and should direct the inquiry to the actual verdict and the genuinely disputed fact questions.

To be sure, a detailed imagining of possibilities in even the simplest trial can lead to endless speculation about what arguments or testimony a jury might have believed or disbelieved or, for that matter, what inferences it might have conjured on its own. But any fair-minded and logical attempt to resolve what a jury *actually* decided for purposes of preserving the right against double jeopardy will focus, like the civil summary judgment standard would, on the genuinely disputed material facts at trial. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776 (2007) (the non-movant must show more than "some metaphysical doubt"). That, however, is not where the Fifth Circuit's test starts or ends. Rather, driven by its peculiar presumption of rationality, the

Fifth Circuit would require an acquitted defendant to affirmatively reach out to address and disprove increasingly improbable negatives, speculating first about what jurors might have concluded on their own, in spite of the actual contested dispute that played out before them, and then disproving the speculative scenario. The Fifth Circuit's position requires a defendant to repeatedly set up and then knock down a series of shifting straw men.

As detailed in the Petitioner's brief, a majority of the lower courts to confront the collateral estoppel question in the context of a partial verdict have concluded that a jury's failure to decide is not properly included in the process of determining what the jury actually decided. Br. for Pet. at 41-43. As the Seventh Circuit observed, "[t]he powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." *United States v. Bailin,* 977 F.2d 270, 280 (7th Cir. 1992).

Because a jury's failure to decide can result from any of a number of factors, including simple exhaustion or confusion, and not all of which would be accounted for in the Fifth Circuit's presumption of rationality, including that speculation into the defendant's burden is fundamentally unfair. And, while the Amici agree with the Petitioner and the majority of the circuits that unanswered counts should be excluded from the analysis, regardless of how the Court decides to dispose of those counts, it should care to ensure that the process of reconciling the verdict remains "realistic" and "practical." As detailed below, the burden on the defendant should not be constructed as to preclude relief or to assign

all of the risk of uncertainty entirely to him, when the purpose of the Double Jeopardy Clause is to protect the accused from the realistic and practical effects of a subsequent prosecution.

B. Any speculation beyond the actively contested issues should not be part of the defendant's burden and should be sufficiently grounded so as to not strip the Double Jeopardy Clause of meaningful effect.

Partial verdicts and jury exhaustion are unavoidable realities. But constructing a test for examining the effect of an acquittal that leaves the defendant operating against a presumption that the jury would have acquitted in full had it remained to the end denies the Double Jeopardy Clause of any meaningful effect. Even without the difficulties presented by a partial verdict, such a test leaves the defendant struggling to explain away a series of improbable rationalizations for the actual verdict. This is precisely what the Court warned against in *Ashe* when it noted, albeit somewhat vaguely, that the "inquiry 'must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575 (1948)). Indeed, it seemed to predict the consequences of a standard like the one adopted by the Fifth Circuit here: "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

This Court should clarify the scope of what should be considered to determine what ultimate facts a jury decided, that is, what is included in the forensic analysis of the original verdict. The arguments and inferences urged at trial are obviously key to any analysis of what a jury necessarily decided. Likewise, the existence of agreed or effectively uncontested facts focuses the analysis on the ultimate factual issues the jury had to weigh in order to reach its verdict. At a minimum, the government should bear the burden of proving that its theory of indecision is at least more likely than the defendant's proposed theory that the jury decided the verdict on some factual basis that would constitutionally prohibit a retrial. However the Court determines the framework of *Ashe v. Swenson* should be applied, the Court should confront the risks of speculation and confirm what level of certainty is to be required before a subsequent trial can be permitted consistent with the guarantee against Double Jeopardy .

If the Court decides to include in the analysis speculation beyond the actual verdict and genuinely disputed issues of material fact, the Court should insist that *probability* enter the analysis. While the mere theoretical possibility that a jury decided a fact that favors the defendant is insufficient under *Ashe*, where the defendant makes an affirmative showing that would rule out those ultimate issues of fact not genuinely disputed at trial, the inquiry should move forward. Where the defendant goes further and identifies the issues actively contested at trial and establishes that the jury's verdict necessarily resolved a material fact in common in both an acquitted and unanswered count, the burden should

shift to the government to show the defendant's contentions are probably incorrect based on the record of that particular trial. Once the defendant's prima facie case has been made, the prospect that the jury was acting on some *sub rosa* distinctions or drew some un-urged inference of its own may remain within the realm of conceivable possibility, but this possibility is not a basis for denying the judgment of acquittal any operative effect. Instead, the Court should require the government to show why a newly conjured rationale is in fact more likely than the defendant's theory to explain the cause for the jury's verdict. The government's showing should be based on a realistic and practical review of the record and not on speculation as to what the jury might have done. Or, if the Court leaves the burden with the defendant, the analysis should allow the benefit of estoppel where the defendant can demonstrate that the government's speculation is improbable based on the record of the particular trial.

Reasons can always be imagined if the weighing of a rational jury's decision is unmoored from the record of a particular trial. When the theory of the case is urged in opening and closing arguments, with dueling evidence on contested issues in between, the greatest probability is that the jury's acquittal was based on one of the hotly disputed issues, not a new theory proffered by the government in post-verdict briefing. If Double Jeopardy's collateral estoppel protections are to have any meaning, the defendant should have the benefit of that probability and not be forced to explain away even the most unlikely of possible explanations for the jury's verdict.

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the judgment of the Fifth Circuit in this matter and fully articulate a workable, practical test that preserves the protections of collateral estoppel for criminal defendants.

Respectfully submitted,

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